Vivanet Pty Ltd v Power [2001] NTSC 66

PARTIES:	VIVANET PTY LTD
	v
	TREVOR POWER
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 36 of 2001 (20102075)
DELIVERED:	8 August 2001
HEARING DATES:	26 February 2001
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Plaintiff:	J Kelly
Defendant:	BL Jones

Solicitors:

Plaintiff::	Hunt & Hunt
Defendant:	Brian L Johns

Judgment category classification:	C
Judgment ID Number:	Mil01248
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN
No. 36 of 2001 (20102075)

Vivanet Pty Ltd v Power [2001] NTSC 66

BETWEEN:

VIVANET PTY LTD
Plaintiff

AND:

TREVOR POWER
Defendant

CORAM: MILDREN J

REASONS FOR RULING

(Delivered 8 August 2001)

MILDREN J*:*

[1] This is an application for an order for costs relating to interlocutory proceedings. On 8 February 2001 upon the urgent application of the plaintiff, I made an *ex parte* order against the defendant requiring him to deliver up certain property to the plaintiff and permitting the plaintiff's agents to enter the defendant's premises to search for and remove the property if necessary.

[2] On 9 February 2001, I made a further order on the *ex parte* application of the plaintiff pursuant to Order 75.08 of the Supreme Court Rules for a warrant to be issued for the arrest and detention of the defendant until he was brought before this Court to answer a charge of contempt of court,

unless he gave certain security to answer the charge. On 10 February 2001, the defendant by his solicitor filed an appearance to the originating motion and following a further hearing that day, I discharged the order for the arrest and detention of the defendant. I was informed by counsel that the defendant had delivered up possession of the property to the plaintiff and that the plaintiff did not wish to pursue the summons for contempt of court. I reserved the costs of the application on the summonses for contempt and for the arrest and detention of the defendant until 13 February.

[3] On 13 February, the matter was adjourned until 20 February and on that date adjourned again to 26 February.

[4] On 26 February, I made an order releasing the plaintiff from certain undertakings given to the Court at the time of the original order of 8 February and heard the plaintiff's applications for costs. The plaintiff also sought an order that the costs of the applications be taxed on an indemnity basis, and for those costs to be taxed and paid immediately. The defendant did not resist the making of the costs orders sought but did resist the application for indemnity costs and the orders for immediate taxation and payment.

[5] According to the affidavit of Mr Brooks, the plaintiff's Project Manager, the property in question comprised two Network Access Servers and an Uninterrupted Power Supply Unit. The plaintiff is an internet infrastructure and access provider. The defendant was, at the material times, an internet

service provider. The property was provided to the defendant so as to enable the defendant to establish his business as part of an arrangement whereby the plaintiff would sell telephone time to the defendant. The plaintiff alleged that the defendant's business was not a success, that he owes it some $15,000, that the defendant told its representatives he was going out of business, but that the defendant claimed that the business was destroyed due to "continuous problems with services supplied by Vivanet and through the Telstra Network" and intended to claim some $200,000. By 6 February the defendant had indicated that he intended to turn the power off to the plaintiff's equipment. Efforts to retrieve the equipment were made on 7 February, but the defendant refused to deliver it up and on 8 February sent a fax to the plaintiff which read as follows:

8 FEB 2001 6.00 A.M.

ATTENTION VIVANET, TELSTRA & CO & OTHERS

ENTRY ONTO 8 BAILEY CIRC. DRIVER, PALMERSTON N.T. 0830 IS NOW CONSIDERED AS TRESPASSING!

VIVANET EQUIPMENT HAS NOW BEEN RELOCATED TELSTRA EQUIPMENT HAS NOW BEEN RELOCATED SERVERS HAVE BEEN RELOCATED TO HAVE HARDDRIVES REMOVED WITH, FOR, & AS EVIDENCE. SERVER CARCASES WILL BE SOLD FOR A ONE WAY TICKET TO MELBOURNE. MY EVERY INTENTION IS TO CREATE SOME VERY EXTREME NEGATIVE PR FOR VIVANET THROUGH EVERY MEANS. WE WILL BE COVERED BY MEDIA, AS I AM PREPARED TO GO TO JAIL! (ARE YOU). ALL ISP'S INCLUDING YOUR CUSTOMER BASE WILL BE NOTIFIED OF VIVANET'S ACTIONS & LACK OF RESOLVE. TROY BROOKS & DAN TYRRELL & CARDY CHUNG HAVE BEEN GIVEN EVERY OPPORTUNITY SETTLE THIS MATTER WITH MINIMAL FUSS TO MOVE FORWARD

> LOOK (sic) AND YOUR EQUIPMENT RETURNED IN GOOD FAITH OTHERWISE YOU WILL RECEIVE A VIDEO & MPEG FILE OF IT BLOWING UP

The plaintiff purchased the equipment overseas for well in excess of $A100,000.

[6] At the hearing on 9 February, I heard evidence from a Mr Cook, a licensed process server, who served the order of 9 February and copies of the originating motion, summons and the affidavit of Mr Brooks on the defendant. This occurred at the defendant's home at 8 Bailey Court, Driver. Mr Cook read to the defendant the terms of the order. The defendant said he would not comply with it. He refused to allow Mr Cook entry to remove the equipment or to tell him where it was. Mr Cook said he had attempted to serve the order at an earlier time on 8 February, but there was no one at home. The door to the storeroom where the equipment had been located was locked. Taped to the door was a handwritten message in the corner of which was a small bullet. The message was in similar terms to the fax sent to the plaintiff up to and including "I am prepared to go to Jail! (are you)".

[7] The defendant has sworn an affidavit in which he acknowledges that the agreement between himself and the plaintiff was terminated in November 2000 and that the plaintiff was entitled to the return of the equipment upon demand. He admitted that one of the access servers was demanded in January 2001 and that all equipment was demanded on 7 February. He also acknowledged that the order of 8 February had been served upon him on 9

February and that the documents were given to him. He claims that he misunderstood the order and thought that he had until 15 February to get legal advice.

[8] The order states that "the defendant forthwith deliver up to the plaintiff" the property. It refers to further consideration of the summons being adjourned to 15 February.

[9] In his affidavit, Mr Power says he told Mr Cook he wanted to have the documents interpreted first and when Mr Cook left he went to see a friend, Hans Mitterhuber, a licensed bailiff to get advice and to arrange to see a solicitor. Mr Mitterhuber made an appointment for him to see Mr Johns on Tuesday 13 February. He claims he had no intention of deliberately disobeying the Court's order or being in contempt.

[10] The defendant also relies on an affidavit from Mr Mitterhuber who confirms that the defendant showed him the documents served upon him and asked him to assist him to understand their meaning and that he arranged an appointment with Mr Johns for Monday 12 February. The difference in the appointment dates is not significant.

[11] None of the deponents have been cross-examined. Mr Cook was not recalled for cross-examination. I have been invited to decide the issues on the basis of the material I have outlined. It was envisaged at the time that those submissions were made that further orders would be required to resolve the outstanding issues between the parties, namely the question of

the plaintiff's monetary claim and the defendant's counterclaim, and orders were also made in that respect.

[12] The principles upon which costs are ordered in interlocutory proceedings in this Court are governed in part by the Rules of Court. The present Rules came into effect on 1 November 1987 but at that stage Order 63, which deals with costs, had not been made by the Judges. At that stage, there was a full discretion to order costs in interlocutory proceedings and in practice this usually meant that the successful party to an interlocutory application obtained an order for costs. At that time, the Rules did not provide for case-flow management and it was common in civil litigation for both sides to have obtained costs orders during the course of the litigation. This led to frequent taxations and costs orders that appeared to be used as a weapon to force one party or another to negotiate a settlement on unfavourable terms, or to dry up the other party's funds needed to finance the litigation. I say "appeared to be" because there is no evidence that any solicitor attempted to use cost orders for an improper purpose, but in the minds of some, there was an appearance that this might be so, or at least that this was sometimes the effect of such orders. Often the costs orders more or less cancelled each other out at the end of the litigation, or at least could be set off against a much larger order for costs made at the end of the trial. The work involved in taxing out these costs and recovering them was often disproportional to the costs themselves. Accordingly, in 1998 when Order 63 came into force, r63.18 provided that the general rule is that each party to an interlocutory

application will bear his own costs "unless the Court otherwise orders". Those words conferred a discretion, reinforced by r63.03(1), to make an order for costs, notwithstanding the general rule.

[13] The rules also provided that except as provided by the Rules or an order of the Court, costs shall be taxed on the "standard basis". For an explanation of this expression, see r63.26. Rule 63.29(1) provides that the Court may order that costs be paid on an "indemnity basis", (as to which see r63.27). There is a significant difference between the two. The former are limited by the requirement that the amounts be reasonable and reasonably incurred, whilst the latter is limited to all costs which are not unreasonable or not unreasonably incurred, with any doubts as to unreasonableness to be resolved in favour of the receiving party. However, the point is that once again there is an unfettered discretion to depart from the general rule.

[14] Further, r63.04(3) provides that where the Court makes an interlocutory order for costs, the costs shall not be taxed until the conclusion of the proceeding to which they relate. Rule 63.04(4) grants a discretion to the Court to order that such costs be taxed at an earlier time.

[15] Consequently, in respect of each of the applications, the plaintiff seeks orders which require the Court to exercise three separate discretions in its favour. As to the first discretion, i.e. to make an order for costs at all, the defendant does not oppose this. I think this is a wise concession. But should the Court depart from the general rule and order that costs be taxed

on an indemnity basis? The discretion is unfettered, but nevertheless must be exercised judicially and generally speaking, that means showing special circumstances: see *Milingimbi Educational and Cultural Association Incorporated v Davis and The Museums and Art Galleries Board* (1990) NTJ 923 at 928-9, per Kearney J; *Re Wilcox; ex parte Venture Industries Pty Ltd and Others* (1996) 141 ALR 727 at 729; 734. What special circumstances existed here? In relation to the application for the order made on 8 February, I consider there were special circumstances. The defendant knew he had to return the equipment on demand and did not return it. He had no legitimate reason for refusing to do so. Not only that, but he led the plaintiff to believe that he may have concealed the whereabouts of the equipment and removed the hard drives. He threatened to sell the server-cases and leave the jurisdiction. He threatened to blow up the equipment if his demands were not met. He showed that he was not afraid to go to gaol for breaking the law.

[16] In relation to the contempt proceedings, he now says he did not understand the order and he thought he had until 15 February to get legal advice. The order is plain in its terms. It said that the defendant was required to deliver up the property *forthwith*. It ordered the defendant to permit the plaintiff's agents to enter his premises to search for and seize the equipment. He read the order and he acknowledges that it was read to him by Mr Cook. The order had endorsed on it a statement to the effect that in default of compliance the plaintiff was at liberty to apply to the Court for the

immediate committal of the defendant to prison. He acknowledges that this was drawn to his attention. He admits he refused to comply with the order. He was asked whether the equipment was still at his home, but refused to say whether it was or not. He does not say that he asked for time to contact a solicitor, although he did say he wanted to have the documents "interpreted first". I do not find he contumeliously disobeyed the order given that he has not been cross-examined. However, I do not consider that he behaved reasonably. Given that it was 3.30 a.m. on a Friday afternoon, it might have been reasonable for him to have asked Mr Cook to wait whilst he rang a solicitor for advice, but he made not attempt to do so. He did not withdraw the threat to dismantle the property or to destroy it. Had he done so and admitted that the property was on the premises, things might have been different. As things stood, the plaintiff was not to know what was in his mind and what he might have done. Mr Johns emphasised that the defendant had not acted contumeliously (so far as the contempt application was concerned) and that the goods were handed over promptly and in good order as soon as he had got advice. He submitted that the defendant had spent overnight in custody and that it would be unjust to order him to pay indemnity costs, or for the plaintiff to be allowed to tax its costs now. I consider that there are special circumstances which warrant an order for indemnity costs on that summons as well, notwithstanding the submissions of his counsel.

[17] As to the discretion to order that the costs be taxed immediately, what was put was that these proceedings were discreet from the issues that remain between the parties in that the plaintiff's applications were brought to secure and recover the property, that the defendant ought to have anticipated that his unreasonable behaviour would result in court action against him and that this could have been avoided if he had acted reasonably. The authorities show that a "just approach" is required before an order should be made departing from the general rule and that each of the matters referred to by the plaintiff have been considered sufficient to warrant departure from the general rule. In these circumstances, I consider that the plaintiff is entitled to an order that the costs be taxed forthwith: see *TTE Pty Ltd v Ken Day Pty Ltd* (unreported, 29 May 1990, Martin J); *Yow v Northern Territory Gymnastic Association Inc* (1991) 1 NTLR 180; *Milingimbi Educational and Cultural Association Incorporated v Davis and The Museums and Art Galleries Board, supra.*

[18] I make the following orders in relation to both summonses:

1. The defendant is to pay the plaintiff's costs of and incidental to the summons on an indemnity basis.

2. Order that the plaintiff may tax its costs forthwith.

3. I certify fit for counsel.